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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 396

SALMON AND COWIN, INC., MINING ENGINEERS AND
CONTRACTORS, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH
CIRCUIT*

**BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN
OPPOSITION**

OPINIONS BELOW

The opinion of the court below (R. 80-83)¹ is reported in 148 F. 2d 941. The findings of fact,

¹ The record before this Court is composed of four volumes, the "Appendix to Brief for the National Labor Relations Board" in the court below, herein referred to as "B. A. "; two volumes entitled "Appendix to Brief for Salmon & Cowin, Inc," herein referred to as "P. A. Vol I, " and "P. A. Vol. II, " respectively; and a volume entitled "Transcript of Record," which contains the Board's decision and order, herein referred to as "R. Dec. ," followed by the pleadings in this proceeding, herein referred to as "R. Pl. ," and the opinion, decree and other proceedings in the court below, herein referred to as "R. ."

conclusions of law, and order of the National Labor Relations Board (R. Dec. 9-45) are reported in 57 N. L. R. B. 845.

JURISDICTION

The decree of the court below (R. 92-95) was entered on June 4, 1945. A petition for rehearing, filed by petitioner on May 17, 1945 (R. 85-91), was denied on June 1, 1945 (R. 92). The petition for a writ of certiorari was filed on September 4, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) and (f) of the National Labor Relations Act.

QUESTION PRESENTED

Whether there is substantial evidence supporting the findings of the Board, sustained by the court below, that petitioner discriminatorily discharged one Milam in violation of Section 8 (1) and (3) of the Act.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in the Appendix, *infra*, pp. 12-14.

STATEMENT

Upon charges (R. Pl. 12-13) duly filed by the International Union of Mine, Mill and Smelter Workers, herein called the Union, the National Labor Relations Board issued a complaint against

petitioner which alleged in substance that petitioner had violated Section 8 (1) and (3) of the Act by discharging and refusing to reinstate one Milam because of his membership and activities on behalf of the Union, and had violated Section 8 (1) by threatening its employees that if they joined the Union they would lose their jobs or that petitioner would close its business, by questioning employees and applicants for employment as to their union membership, and by other anti-union activities (R. Pl. 14-19). After the usual proceedings, the Board issued its findings of fact, conclusions of law and order (R. Dec. 9-45). The facts, as found by the Board and shown by the evidence, may be summarized as follows:²

When Milam was employed by petitioner in February 1943 (R. Dec. 30; B. A. 31), petitioner's president inquired as to his union membership, and, upon finding that Milam belonged to a union, cautioned him not to "go out there and cause [a] disturbance amongst the men" (R. Dec. 30; B. A. 31-32). At this time there was no union activity among petitioner's employees.

Five months later, on July 8, 1943, Mooney, a representative of the Union, began to organize petitioner's employees and selected Milam as the chairman of a committee of three employees to serve as leaders of this movement among their

² In the following statement, the references preceding the semicolons are to the Board's findings and the succeeding references are to the supporting evidence.

co-workers (R. Dec. 21; B. A. 24-26). Of the three committee members, Milam was the most vigorous and active. He talked of the Union to the men as they rode to work in the company truck; he distributed union cards; and, on July 14 and 15, he distributed notices of a union mass meeting which was scheduled for Sunday, July 18 (R. Dec. 21-22; B. A. 26-27, 39-42). This activity was carried on openly and shortly came to the attention of petitioner's supervisors. A foreman, Chenowith, saw Milam distributing the notices for the meeting of July 18 in front of the company bath house and curtly ordered him off the sidewalk "with them damn things," saying "... the damn union ain't going to help you none" (R. Dec. 22; B. A. 42, 61). On or about Tuesday, July 20, Mooney, the union representative, requested a conference concerning the employees of petitioner who were members of the Union (R. Dec. 22-23; B. A. 11-13, 80). A conference was scheduled for Thursday, July 22, but was later postponed until July 29, (R. Dec. 23; B. A. 11-13). Immediately after this conversation, petitioner's president, Cowin, had prepared and, on July 22, distributed to his employees a letter stating that the Union had requested a conference with him, that no employee would gain benefits through union membership not obtainable otherwise and that he would curtail operations and work with a small group who could "go

along" with him if there were any "additional strain" placed upon him (R. Dec. 25-26; B. A. 77, 79). Twice thereafter, on July 30, while the Union was attempting to negotiate with him, and about the middle of September, Cowin polled his employees, requesting them to cooperate by signing statements concerning their union membership and desire for union representation (R. Dec. 26-29; B. A. 13-19, 59-61, 81-84).

For several weeks prior to July 19, Superintendent Blocker had been paying the day shift, of which Milam was a member, on Friday instead of on Saturday, the usual pay day, at the special request of the men, who said that they could not get their Saturday shopping done when paid on Saturday afternoon (R. Dec. 31; B. A. 44, 51, 62-63). On Wednesday, July 21, Blocker announced that he had discovered that "paying off" on Friday was resulting in Saturday layoffs and that he was going to discontinue the practice (R. Dec. 31; B. A. 44-45). Many of the men, including Milam, protested that if they were not paid on Friday, the twenty-third, they would not work on Saturday (R. Dec. 31; B. A. 44-45, 64). Blocker did pay the men that Friday (R. Dec. 35; B. A. 63, 66-67). In the evening, however, he telephoned Milam and instructed him to report to the office the following morning (R. Dec. 31; B. A. 46, 64). Milam reported as ordered, but when Blocker failed to arrive at the office, Milam, at the sug-

gestion of his foreman, boarded a truck with the working crew, rode to the mine, and commenced the day's work (R. Dec. 31; B. A. 52, 68). Later that morning, Blocker called Milam from his work; accused him of instigating the "no pay, no work" movement; observed that Milam was the "ringleader of this damned Union"; stated that Cowin had "lived always without a union" and was going to continue to do so; characterized Milam's union activities in obscene terms; and discharged him (R. Dec. 31; B. A. 45-49; 53-54). When Milam was paid off, Blocker handed him a copy of the letter of July 22, saying that it would explain why the petitioner was opposed to the unionization of its employees (R. Dec. 33; P. A. Vol. I, 73, P. A. Vol. II, 330-333, B. A. 74-76). Following Milam's discharge, Foreman Lowrey told employee Hall that "If this works," Blocker intended to terminate the employment of Price and Davis, the other two members of the Union's organizing committee (R. 33-34, 36; B. A. 26, 54-55, 60-61). In mid-September, while Milam was distributing union literature outside the petitioner's properties, Foreman Love, to whom he handed one of the leaflets, advised Milam that if he went to Cowin and said "to hell with the damn Union" and apologized, Cowin would immediately restore him to his former job (R. Dec. 34; B. A. 42-43).

The Board, after appraising the evidence respecting Milam's discharge against the background

of events immediately preceding and following it, concluded that petitioner terminated his employment because of his outstanding union activity and that this conduct constituted an unfair labor practice within the meaning of Section 8 (1) and (3) of the Act (R. Dec. 35-38).

Insofar as here material, the Board's order (R. Dec. 13) required petitioner to offer Milam immediate and full reinstatement to his former or substantially equivalent position and to make him whole for any loss of pay he may have suffered by reason of the discharge.

On April 30, 1945, the court below handed down its opinion enforcing the Board's order in full (R. 80-83). On May 17, 1945, petitioner requested a rehearing (R. 85-91) which the court denied on June 1, 1945 (R. 92) and on June 4, 1945, a decree was entered (R. 92-95).

ARGUMENT

While petitioner argues that the court below denied it judicial review by refusing to consider whether Milam was a credible witness (Pet. 9-13), it is apparent from the record that the only real question in this case is whether there was substantial evidence to support the Board's findings. That issue is not one of general importance and the supporting evidence summarized in the Statement, *supra*, pp. 3-7, is, in any event, more than ample.

In refusing to substitute its own judgment as to credibility for that of the Board, the court below has merely following the oft-repeated rulings of this Court. See, *e. g.*, *National Labor Relations Board v. Link Belt Co.*, 311 U. S. 584, 597; *National Labor Relations Board v. Waterman Steamship Corp.*, 309 U. S. 206-226; *National Labor Relations Board v. Nevada Consolidated Copper Corp.*, 316 U. S. 105. Petitioner's characterization of Milam's testimony as "perjured" (Pet. 6, 10-13) does not change the nature of the issue when, as here, there is no foundation in the record for such a characterization. If it appeared that the Board was wholly arbitrary and capricious in giving credence to Milam's testimony, the decision of the court below might be rendered questionable. But the Board carefully weighed the issue of credibility and fully considered the question as to whether Milam's testimony was corroborated by other evidence and consistent with the undisputed facts.

The trial examiner who observed Milam and heard him testify made a careful and painstaking analysis of the witness and his testimony and concluded that any inconsistent statements he may have made did not mark him as an untruthful witness but were explained by the unusually long questioning to which he was subjected, by his virtual illiteracy and lack of education, and by

his general ineptitude as a narrator (R. Dec. 22, n. 12). (See *Valley Mould & Iron Corp. v. National Labor Relations Board*, 116 F. 2d 760, 763 (C. C. A. 7), certiorari denied, 313 U. S. 590; *National Labor Relations Board v. Superior Tanning Co.*, 117 F. 2d 881, 888 (C. C. A. 7), certiorari denied, 313 U. S. 559.) Moreover, Milam's testimony was in part corroborated by undisputed events which occurred both before and after his discharge as well as by the testimony of other witnesses, including those called by petitioner (see, *e. g.*, B. A. 64, 66, 66-67). And, finally, the individuals whom petitioner contended the Board should have believed as against Milam were plainly discredited by undisputed events and by the testimony of other witnesses. This is particularly true of Blocker, who testified that he was not aware of any union activity at the time he discharged Milam (P. A. Vol. II, 247). Yet, Milam and the others had solicited openly (*supra*, p. 4), and Foreman Bence testified without contradiction that, before the discharge, he and Blocker had discussed the employees' efforts to organize and that Blocker had characterized Milam as "working pretty hard at organizing" (B. A. 68).

Petitioner's contention that Milam was discharged for his initiation of the "no pay, no work" movement (Pet. 4), and not for his union

activity, even if true, leaves the Board's finding that he was discriminated against within the intentment of Section 8 (3) of the Act immune to challenge. As the leader of such group action, Milam would clearly, as the Board found (R. Dec. 37, n. 27), have been engaged in a form of concerted activity for the improvement of working conditions which is protected by the Act. *National Labor Relations Board v. Schwartz*, 146 F. 2d 773, 774 (C. C. A. 5); *National Labor Relations Board v. Peter Cailler Kohler Swiss Chocolates Co.*, 130 F. 2d 503, 506 (C. C. A. 2); *National Labor Relations Board v. Good Coal Co.*, 110 F. 2d 501, 503 (C. C. A. 6), certiorari denied, 310 U. S. 630.

2. Petitioner's attempt to raise a jurisdictional issue by questioning whether a fraudulent charge can be the basis of Board proceedings (Pet. 6, 10) is an irresolute one, no doubt because there is nothing in the record on which such a contention can be rested. The charge was filed by the Union (*supra*, p. 2), not by Milam. It asserted other unfair labor practices in addition to Milam's discriminatory discharge. All of these were sustained by the Board (R. Dec. 21-38), and, in the court below (Pet. 3), petitioner challenged only those Board findings which related to Milam's discharge (R. 81).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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